Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES TAYLOR,

Petitioner,

v.

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a police officer's failure to take affirmative steps to protect the identity of a citizen who reports a crime constitutes a violation of the due process clause by way of the state-created danger theory of constitutional liability suggested in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, City of Green Bay, City of Green Bay Police Department, Cities and Villages Mutual Insurance Company, John Lampkin, Michael Mason, Ken LaTour and Denise Servais were parties before the court of appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 165 F.3d 511 and is reprinted in the Appendix hereto at App. 1-26. The order of the United States District Court for the Eastern District of Wisconsin denying petitioner's motion for summary judgment on the ground of qualified immunity is reproduced in the Appendix at App. 29-30. The district court's judgment based upon the jury verdict is reproduced in the Appendix at App. 31-33.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion and judgment on December 23, 1998. (App. 1-28) On January 6, 1999, the court of appeals granted petitioner's motion for an extension of time to file a petition for rehearing to January 12, 1999. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the court of appeals denied on January 28, 1999. (App. 34-35) This petition for writ of certiorari is filed within 90 days of the denial of the petition for rehearing. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Factual Background

On November 10, 1992, Thomas Monfils called the Green Bay Police Department with an anonymous tip that a fellow worker, Keith Kutska, was going to steal an electric cord when he left work at the James River Paper Mill. Monfils wanted to remain anonymous because Kutska was known to be violent. At Monfils' request, Michelle Wickman, a Communications Center Operator, contacted James River's security about the theft report. Kutska was later stopped by security on his way out of the plant and, upon refusing to submit to a search, was suspended from work for 5 days. Wickman did not record Monfils' call in the department computer system because the police had not been dis-

patched to the plant; however, the call was tape-recorded. (Tr. 141, 158-70; Ex. 4, 5)[1]

Monfils' second anonymous call to the police department on November 12 related fear that Kutska would find out who had reported him. Detective Denise Servais assured Monfils the tape would not be released, but she made no written report of the call at the time. (Tr. 178, 1229-47)

On November 17, Kutska called the police department and asked Lt. Michael Mason if incoming calls were recorded. Kutska said that he had not taken anything, but he was still in trouble with management and wanted to clear his name. Mason said he would need to know the time of the call. Kutska then openly told people at the mill, with Monfils present, that he was going to get a copy of the tape. (Tr. 544-47, 1105-06; Ex. 117)

Later on November 17, Monfils called and told Lt. Ken La Tour, a traffic lieutenant then working as a shift commander, that he had placed an anonymous call and that he feared for his safety if the tape was released. Monfils did not identify himself or Kutska. La Tour suggested that Monfils call Specialist John Lampkin, who worked the day shift and normally handled requests for copies of tapes. La Tour did not make a report of the call. On November 18, Monfils called Lampkin, who said the tape would not be released

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[1] "Tr. ___" citations are to the trial transcripts.

"Ex. ___" citations are to trial exhibits, should the Court desire to view them.

because it would have to pass his desk. (Tr. 213-25, 245-49; Ex. 8, 9)

On November 19, Kutska gave Lieutenant Mason the time of Monfils' November 10 call which he had gotten from the James River security guard. Mason found the tape, listened to it, then checked Kutska's record in the police computer and found no arrests or entries. Mason and office manager Shay Gierczak discussed whether the tape should be released with Assistant City Attorney Judith Schmidt-Lehman. Based on Mason's statements that the department had not pledged confidentiality to the caller and that the caller did not sound scared, Schmidt-Lehman opined that the tape was not exempt from disclosure and could be released. Mason then told Kutska he could have a copy of the tape if he brought in $5 and a blank tape. (Tr. 515-21, 547-53, 1308-12)

On November 20, Monfils called Lampkin to ask how long the tapes of calls were kept. Lampkin transferred the call to Deputy Chief of Detectives James Taylor to whom Monfils related what had been happening, but refused to identify himself. Monfils did not want the tape released because he did not want Kutska to know he had reported him to the police. Taylor said he would put a note with the report stating the tape should not be released. (Tr. 566-70, 637-38)

Shortly thereafter, Assistant District Attorney Pat Hitt called Taylor, saying he had just received a similar call from a person who did not identify himself or the person he was afraid of. Hitt opined that the tape was exempt from disclosure under Wisconsin's Open Records law and should not be released. Hitt offered to call

Lampkin to make sure the tape was not released, but Taylor said he would handle it and put a note with the report. Taylor then checked the computer, found no report of the November 10 call, concluded there was nothing he could do, and did nothing further. (Tr. 639-69)

About 4 hours later, Kutska picked up a copy of the tape and played it at work the next day. When Monfils reported for work, he was warned by a co-worker to watch out because Kutska had the tape. Monfils nevertheless reported to his work station where he was confronted by Kutska, who got Monfils to admit it was his voice on the tape. Within about an hour after reporting for work, Monfils was murdered. Six of his coworkers, including Kutska, were convicted of his murder. (Tr. 376, 442-49, 498)

B. Procedural History

Respondents brought this action for damages under 42 U.S.C. § 1983 and Wisconsin law against the City of Green Bay, its insurer and six City employees, five of whom were or are police officers. The action included a substantive due process claim against Deputy Chief James Taylor,[2] claims against the City premised on equal protection of the laws and ratification of Taylor's conduct, and common law negligence claims against all the individual police officers. The district court had jurisdiction over the § 1983 claims under 28 U.S.C.

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[2] Taylor was the only individual defendant charged by respondents in this case with a civil rights violation. None of the other individual defendants were charged with a civil rights violation.

§ 1331 and § 1343(a), and over the state law negligence claims under 28 U.S.C. § 1367(a).

On May 28, 1997, Taylor appealed the district court's May 12, 1997 denial of his motion for summary judgment on the ground of qualified immunity. (App. 29-30) The rest of the case went to trial. On December 17, 1997, the defendants appealed the district court's entry of judgment based on the jury verdict against the City premised on equal protection and, although there was no specific § 1983 finding against Taylor, for ratification by the City of unconstitutional conduct on Taylor's part; the verdict against the individual police officers, including Taylor, on the state law negligence claims; and the jury's award of damages totaling just over $2 million. (App. 21-26, 31-33) The individual police officers did not contest the verdict against them premised on negligence law, but contended they were entitled to state discretionary act immunity.

The court of appeals consolidated the two appeals. On December 23, 1998, the court vacated the finding that the City violated Monfils' constitutional rights to due process and equal protection. (App. 27) The court directed that judgment be entered against Taylor on the individual § 1983 claim against him, finding that even though the constitutional claim against Taylor had not technically been tried, the evidence was sufficient for the jury to conclude that Taylor had placed Monfils in a position of danger greater than Monfils would otherwise have faced and thus violated Monfils' substantive due process rights. (App. 16-18, 27-28) The court rejected the police officers' claim of immunity under state law and affirmed the judgment on the negligence claims

and the damage findings. (App. 19-20) Taylor's request for rehearing and *en banc* review was denied on January 28, 1999. (App. 34-35)

ARGUMENT FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT ISSUE CONCERNING THE UNWARRANTED EXPANSION OF THE STATE-CREATED DANGER DOCTRINE SUGGESTED IN *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES* TO INCLUDE A GOVERNMENTAL ACTOR'S FAILURE TO TAKE MORE AFFIRMATIVE ACTION TO PROTECT AN INDIVIDUAL AGAINST PRIVATE VIOLENCE BY A THIRD PARTY.

The Seventh Circuit's decision refashions the rule set out by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), governing the state's failure to prevent injury to individuals by third persons.

The Seventh Circuit ostensibly recognized that Taylor was the only individual defendant charged with a substantive due process violation and, therefore, that only his conduct alone could be considered in determining whether there was a due process violation. The court of appeals also acknowledged that *DeShaney* provides the framework for assessing the due process claim. Yet the court subverted the holding in *DeShaney* by finding that Taylor violated a constitutional duty without ever identifying any affirmative act committed by Taylor which created or enhanced the danger faced by Monfils.

The basis for finding liability against Taylor by the Seventh Circuit was two-fold: 1) that Taylor "knew" of

Monfils' predicament "for he had talked to Monfils about it;" and 2) that Taylor had assured Hitt he would make sure the tape was not released, "but he nevertheless allowed it to get out" by "not following through." (App. 13, 17)[3]

Under *DeShaney*, however, state actors have no due process obligation to protect individuals from private violence. 489 U.S. at 195-97. An affirmative duty to protect does not arise from the state's knowledge of an individual's predicament or promises to aid, but because of the limitation which "*it has imposed* on his freedom to act on his own behalf." 489 U.S. at 200 (emphasis added). Outside a strictly custodial context, the only possibility left open in *DeShaney* where the state might owe an affirmative duty is if a state actor creates the danger or renders an individual more vulnerable to it. *Id.*

This Court has repeatedly cautioned against expanding the concept of substantive due process: "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Specifically, the Court has "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Id.* at 128. The Constitution "does not purport to

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[3] The court of appeals stated that rather than taking steps to prevent the tape's release, Taylor "went deer hunting." (App. 16) This was not fact testified to by Taylor, but only argument made by respondents' counsel. (Tr. 634-35, 1459)

supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

Until now, post-*DeShaney* courts which have adopted the state-created danger theory indicated in *DeShaney*[4] have attempted to heed this caution by predicating liability on an affirmative act requirement—whether the state actor involved affirmatively acted to create the plaintiff's danger or to render him/her more vulnerable to it. *See, Uhlrig v. Harder*, 64 F.3d 567, 572 n.6 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996) (quoting, *Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991, 995 (10th Cir. 1994): "This state-created danger doctrine necessarily involves affirmative conduct on the part of the State in placing the plaintiff in danger"); *Carlton v. Cleburne County, Ark.*, 93 F.3d 505, 508 (8th Cir. 1996) (Cases where duty to protect arises "have consistently involved affirmative conduct by government officials directly responsible for placing particular individuals in a position of danger" such that "individuals would not have been in harm's way but for the government's affirmative actions"); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (Liability under the state-created danger theory is "predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence").

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[4] The Fifth Circuit, for one, has not adopted the state-created danger theory. *Randolph v. Cervantes*, 130 F.3d 727, 730 (5th Cir. 1997), *cert. denied*, 119 S. Ct. 65 (1998).

While the precise parameters of the state-created danger exception are far from settled, it is of critical note that the state-created danger line of cases finding § 1983 liability, including those cases relied on by the Seventh Circuit below, have all involved affirmative actions by the state itself which created the situations resulting in injury to victims.

For example, in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), police arrested an intoxicated driver and impounded his car, knowingly leaving his passenger stranded during the night in a high crime area where she was attacked and raped by a third person. The court of appeals concluded that "a police officer may be liable under § 1983 when he abandons passengers of arrested drivers under circumstances which expose them to unreasonable danger." *Id.* at 593.

Various other cases have involved affirmative state action. *See, e.g., Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 356 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) (state "did indeed create the dangerous situation" by bringing inmate with violent criminal history to work in town hall where plaintiff was employed); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (potential § 1983 claim based on affirmative action of police chief in directing other officers not to stop estranged husband's violent conduct against decedent); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993) (allegations that police officers conspired with "skinheads" to permit them to beat up flag burners with relative impunity stated a § 1983 action); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.), *cert. denied*, 510

U.S. 947 (1993) (police officer who removed a sober driver and left behind a passenger with keys to the car subject to liability under § 1983); *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) (affirmative acts of police in stopping couple walking home from night of drinking, allowing husband to proceed home, then leaving visibly intoxicated wife alone to walk home on cold night created a dangerous situation resulting in injury to wife).

Unlike these cases, the instant case does not involve affirmative action by a governmental official. It is about inaction—Taylor's failure to take more affirmative steps to protect Monfils. The facts are undisputed that Taylor did not create the tape made of Monfils' call to the police department; he did not release the tape to Kutska; he did not direct anyone else to release the tape; he did not know the tape was about to be released; and he took no action to facilitate release of the tape. The Seventh Circuit's decision makes it unmistakably clear that the basis of Taylor's liability was his inaction:

> Taylor did nothing to prevent the release [of the tape.] (App. 5)
>
> But all Taylor did was check the computer system for a report of a November 10th call. Finding no report because, as we know, none was prepared, he did nothing. He did not talk to Lampkin. He did not look for the tape. (Id.)
>
> Taylor took responsibility for preventing release of the tape but did nothing about it. (App. 15)
>
> Taylor also testified that he looked for a report and, finding none, did nothing. (App. 16)

The differences between "creating or enhancing the danger" by affirmative misconduct (where liability exists) and the failure to protect (where liability does not exist) have been noted:

> It cannot be that the state "commits an affirmative act" or "creates a danger" every time it does anything that makes injury at the hands of a third party more likely. If so, the state would be liable for every crime committed by the prisoners it released. [citation omitted] No amount of semantics can disguise the fact that the real "affirmative act" here was committed by [the attacker], not by [the police officer].
>
> * * *
>
> While it is true that inaction can often be artfully recharacterized as "action," courts should resist the temptation to inject this alternate framework into omission cases by stretching the concept of "affirmative acts" beyond the context of immediate interactions between the officer and the plaintiff. (*Pinder v. Johnson*, 54 F.3d 1169, 1175, 1176 note* (4th Cir.), *cert. denied*, 516 U.S. 994 (1995))

No amount of semantics can disguise the fact that the real "affirmative act" in the instant case was committed by Kutska, not by Taylor. While Taylor "could and should" have pursued a search for the tape, he was not "constitutionally compelled to do so." *Brown v. Grabowski*, 922 F.2d 1097, 1116 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991). Under *DeShaney*, Taylor's mere knowledge of Monfils' situation, as well as his promise to put a note with the report of Monfils' call stating that the tape should not be released, do not afford a basis for finding § 1983 liability.

The finding of liability against Taylor by the Seventh Circuit for his failure to do more to protect Monfils conflicts with *DeShaney*, which squarely rejected the argument that a state omission or failure to act can constitute a substantive due process violation. 489 U.S. at 196-98. It conflicts with the Court's caution in *Collins* against expansion of liability based on substantive due process. It also conflicts with other courts of appeals' decisions, including prior decisions of the Seventh Circuit in somewhat similar situations.

For example, the Fourth Circuit held there was no violation of a constitutional duty in *Pinder v. Johnson*, *supra*, where a police officer arrested the plaintiff's former boyfriend after witnessing his violent behavior and violent threats against her; assured her it was safe to leave her children at home and return to work because the boyfriend would be kept in custody overnight; but then charged the boyfriend with only minor offenses, thus assuring his release that same evening. The court found that, as in *DeShaney*, the plaintiff's case was "purely an omission claim." 54 F.3d at 1176.

Likewise, in a pre-*DeShaney* decision, the Seventh Circuit held in *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), that a dispatcher did not have a constitutional due process duty to dispatch a rescue squad to a woman's home despite the fact that the dispatcher had given both the woman and her friend inept medical advice that breathing into a bag would solve the woman's problems, which advice arguably caused her and her friend to refrain from seeking help from other sources from the time of her first call until she died hours later; also despite the

dispatcher's assurance to the friend that the woman's heavy breathing would not wear her heart out. 847 F.2d at 1213-14.

Following *DeShaney*, the Seventh Circuit held there was no constitutional liability in *Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991), where a governmental actor (Deputy Hovell), agreed to accompany a domestic violence victim to the trailer that she had previously occupied with her estranged husband to get her belongings. The victim would not have gone to the trailer without the deputy agreeing to go with her. Once inside the trailer, an argument ensued between the victim and her husband which lasted for about an hour, after which the victim was shot dead by her husband. Deputy Hovell did not try to intervene to protect the victim—he did nothing. 946 F.2d at 547-48. Plaintiffs claimed that by agreeing to accompany the victim to the trailer, Deputy Hovell became responsible for her welfare and protection because she would not have otherwise gone to the trailer, and that the Deputy's inaction in failing to protect her violated her rights to substantive due process under the state-created danger doctrine. *Id.* at 550. The court of appeals noted that had the deputy not accompanied the victim, she would not have gone to the trailer and that the deputy may have known of the estranged husband's violent tendencies. Nevertheless, there was no affirmative act committed by the deputy which created any danger to the victim. The deputy's failure to act to prevent the victim's murder was insufficient to impose liability upon him.

These decisions are consistent with *DeShaney*—the Seventh Circuit's decision in the instant case is not. The limited scope of respondents' due process claim must be reiterated. Respondents charged only Taylor with violating Monfils' right to due process under the state-created danger theory. They did not charge any other individual defendant under that theory. Specifically, respondents did not charge Lieutenant Mason, who took the affirmative steps of releasing the tape to Kutska, with violating Monfils' due process rights under the state-created danger theory. In holding Taylor liable under § 1983 because he "did nothing," the Seventh Circuit could not have made the point clearer: from now on, despite the plain holding in *DeShaney*, governmental actors will be liable for inaction when a party claims that a governmental actor should have done more to protect a private citizen from danger.

The Seventh Circuit's decision sets an entirely new precedent for determining substantive due process claims against governmental officials for failure to protect individuals from injury by third parties. Supreme Court guidance is necessary and critical to prevent lower courts from eviscerating the principle so plainly clarified in *DeShaney* that a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 97-2338 & 97-4179

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Plaintiffs-Appellees,

v.

JAMES TAYLOR; CITY OF GREEN BAY, a municipal corporation, CITY OF GREEN BAY POLICE DEPT., CITIES AND VILLAGES MUTUAL INSURANCE COMPANY, a Wisconsin insurance corporation, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 95-C-1239—**Thomas J. Curran**, *Judge.*

ARGUED SEPTEMBER 25, 1998—DECIDED DECEMBER 23, 1998

Before FLAUM, MANION, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* It was a gruesome discovery. On a Sunday night in November of 1992, a two-story pulp vat at the James River Paper Mill in Green Bay, Wisconsin, was drained. The body of a James River employee, Thomas Monfils, was discovered at the bottom of the vat. The body was mutilated—the vat had propellers that

stirred the thick pump mixture. A rope, with a 50-pound weight, was tied to Monfils' neck.

Eventually, six James River employees were convicted of murdering Monfils. They are serving life sentences. This case concerns a claim that the Green Bay Police Department and several of its officers bear some responsibility for Monfils' death. The facts follow.

On November 10, 1992, the 35-year-old Monfils called the Green Bay Police Department with an anonymous tip. He said a fellow worker at the James River plant, Keith Kutska, was going to steal an electrical cord when he left work. The police called security at the plant and Kutska was stopped on his way out the door. He refused to submit to a search and, because of his refusal, was suspended from work for 5 days. Incensed that someone reported him, Kutska went about trying to discover who the informant was. Kutska made no secret of what he was doing, and Monfils realized he was in peril.

What followed were several more calls to the police by Monfils, trying to prevent release of a tape recording of his November 10 call, and by Kutska, trying to obtain a copy of the tape of the call so he could identify the informant. As fate would have it, members of the police department acted efficiently, if inappropriately, in response to Kutska's calls and ineptly, at best, to those placed by Monfils. The only police officer who seemed willing and able to locate a tape recording of the call released it to Kutska, who quickly recognized Monfils' voice when the tape was played. On November 21, 1992, Monfils was beaten and thrown, alive but, mercifully, unconscious, into the pulp vat with the 50-pound weight tied around his neck. It was thought that the heavy metal blades at the bottom of the vat would dispose of Monfils' body, but it was discovered 2 days later. Three years later, six of Monfils' co-workers, including Kutska, were found guilty of murder.

The details regarding the calls to the police department show that the left hand did not know—or much care—what the right hand was doing.

As we said, Monfils made his theft report telephone call to the Green Bay Police Department on November 10. At 4:45 a.m. he talked with Michelle Wickman, a GBPD Communications Center operator. Monfils said he wanted to remain anonymous (as he did in all the conversations) because Kutska was "known to be violent." Wickman then made a call to James River security and told someone there about the theft report. Because police were not dispatched to the plant, Wickman did not prepare a written report of the call. Had she written a report, it could have been accessed by using a police computer. The telephone call, however, was tape-recorded by the police consistent with department policy.

Two days later, on November 12, Monfils called the police again; this time he spoke with GBPD Detective Denise Servais. He told her of his previous call and of his fear of what would happen if Kutska found out who reported him. Kutska, said Monfils, was "crazy and a biker type." Monfils wanted to be sure the tape would not get out and Servais assured him there was "no way in hell" it would be released. Servais made no written report of this call until after Monfils' body was pulled out of the pulp vat.

In his attempt to obtain the tape, Kutska called the police department on November 17 and spoke to Lieutenant Michael Mason. Kutska said he was trying to find out who reported him to James River security because that person got him in trouble. Mason said he would need to know what time the call came in, and he told Kutska to call another officer who might remember. Somehow Kutska learned the time of the call and said at work, in the presence of a number of workers, including Monfils, that he was going to get a copy of the tape.

After 10 p.m. on November 17, obviously frightened by Kutska's statements, Monfils called the police again and asked to speak to the "highest guy up." He was put through to Lieutenant Kenneth LaTour, the acting shift commander. Monfils told LaTour that he had placed an anonymous call, that Kutska was trying to get a copy of the tape, and if he did, Kutska would recognize his voice. He described Kutska as a biker type with nothing to lose and said he was afraid that one day he would not come home—that the guy would "take him out." LaTour told Monfils that he was pretty sure the tape could not be released, but he advised Monfils to call John Lampkin, who worked in the GBPD's communication section. Even though he understood Monfils' fear that he might be killed or badly hurt, LaTour did not refer the information to anyone or take any other steps. He also did not make a written report of this call.

On the 18th, Monfils called Lampkin, as LaTour had suggested. It was to Lampkin that a request for a copy of the tape would normally be directed, Police Chief Robert Langan later testified. Lampkin told Monfils that the tape would not be released because it would have to cross his desk first. He prepared a two-sentence note regarding this call, but not until a week after the murder.

Meanwhile Kutska was persisting in his attempt to obtain a tape of the November 10 anonymous call. On the 19th he called Lt. Mason, who located the tape of the call and listened to it. Mason had also checked the computer but found no written report relating to the call because, of course, up to this point no one had written one. Mason talked to an office worker, Shay Gierczak, about whether the tape should be released. The two of them called Assistant City Attorney Judith Schmidt-Lehman to discuss the issue. Of the three, only Mason had heard the tape. Schmidt-Lehman asked whether there had been a specific promise that the caller would be kept anonymous. Mason said no. He was basing his answer on the tape itself. He did not know about the other calls Monfils had made. He

also had not checked with any other member of the department about the call. Even though he was not ordinarily the person who released records, that afternoon Mason called Kutska and told him that if he brought in $5 (and a blank tape) the next day he could get a copy of the tape of the call. In turn, Kutska told people at James River, including Monfils, that he would be picking up a tape recording of the call after he got out of work.

On the 20th at 10 a.m. Monfils called Lampkin, who said the tape would not be released. Lampkin transferred the call to Deputy Chief of Detectives James Taylor, to whom Monfils related what had been happening and that he feared what would happen if Kutska and his co-workers found out he snitched. Taylor assured him that the tape would not be released. But after the conversation, Taylor did nothing to prevent the release and, in fact, at that very time, the tape was on a desk in the records office 30 feet away awaiting release.

Despite Taylor's assurance that the tape would not be released, Monfils took yet another step to protect himself. He called the Brown County district attorney's office and spoke with Assistant District Attorney Pat Hitt. Hitt immediately thought there were grounds to refuse to release the tape under Wisconsin's Open Records Law, and he told Monfils that he would call Taylor to tell him not to release it. As he said he would, Hitt immediately made that call; Taylor said he knew about the case. Hitt offered to call Lampkin to make sure the tape was not released but Taylor said he would take care of it, and he assured Hitt that the tape would not be released. But all Taylor did was check the computer system for a report of the November 10th call. Finding no report because, as we know, none was prepared, he did nothing. He did not talk to Lampkin. He did not look for the tape. In his words, he "just let it go." And "go" it did.

The next day Kutska obtained a copy of the tape and played it. He recognized Monfils' voice, as did others for

whom it was played. The rest is history. Monfils was dead by 7:30 a.m.

Monfils' widow, his children, and his estate filed this lawsuit under 42 U.S.C. § 1983 and Wisconsin law. It included a substantive due process claim against Deputy Chief Taylor and a claim against the City of Green Bay for ratifying Taylor's conduct. There was also an equal protection claim against the City for treating anonymous informants differently from those who disclose their identity; the individual defendants—Taylor, Servais, LaTour, Lampkin, and Mason—were sued for common law negligence.

Taylor filed a motion for summary judgment based on qualified immunity. It was denied and he appealed. While that appeal was pending, the rest of the case went to trial. At trial, there was no specific § 1983 finding against Taylor, although the jury entered a verdict against Green Bay for "ratification of unconstitutional conduct on the part of Chief Deputy Taylor." There was a verdict against the City based on the equal protection claim. The individual defendants, including Taylor, were found to have been negligent under state law. The jury awarded damages totaling just over $2 million. [The jury verdict is affixed as an appendix to this opinion.]

This appeal was filed from the judgment entered on the jury verdict. It is consolidated with Taylor's appeal from the denial of his motion for qualified immunity. This issue, which will require most of our attention, involves the substantive due process claim against the City, which is, in turn, predicated upon Deputy Chief Taylor's allegedly unconstitutional conduct. Related as well is whether Taylor is entitled to qualified immunity and, if not, what must be done about the substantive due process claim against Taylor individually.

The plaintiffs claimed that the City violated Thomas Monfils' substantive due process rights in three ways: by constitutionally inadequate training of its officers; through

a custom or policy of the City; and by ratification of Deputy Chief Taylor's unconstitutional conduct. The plaintiffs prevailed on the third constitutional claim which involves two issues—whether Taylor's conduct was unconstitutional and whether it was ratified by the City. The nature of the substantive due process claim is relevant to Taylor's qualified immunity claim.

First, we consider whether Taylor's conduct could give rise to a substantive due process claim against the City. The City did not and does not object to the jury instruction on the substantive due process claim, nor does it contend that, as a matter of law, the events here do not fall within the contours of a substantive due process claim. The City contends only that the evidence was not sufficient to support the jury verdict.[1] When the sufficiency of the evidence is the issue, our concern ordinarily is only whether interpreting the facts in the light most favorable to the plaintiffs, a reasonable jury could conclude that Monfils' substantive due process rights were violated. *BE&K Constr. Co. v. Will & Grundy Counties Bldg. Trades Council*, 156 F.3d 756 (7th Cir. 1998). But because a substantive due process claim such as this one must be so closely intertwined with the facts, and because our discussion of ratification depends on what exactly is or is not being ratified, we will discuss briefly the nature of the claim.

We start with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989), in which the Supreme Court made clear that the Due Process Clause is a limitation on the state's power to act, not a guarantee of certain minimal levels of safety and security. Two "exceptions" have grown out of *DeShaney*. One exists if the state has a "special relationship" with a person, that

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[1] The City does not contend that the evidence was insufficient as to Taylor's state of mind. We therefore do not enter the thicket involving what standard is applicable.

is, if the state has custody of a person, thus cutting off alternate avenues of aid. *See Youngberg v. Romeo*, 457 U.S. 307 (1982) (requiring services to involuntarily committed mental patients); *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983) (requiring medical care for suspects in police custody); *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (holding that a child in state custody has a liberty interest in not being placed in an abusive foster home). The other is the state-created danger exception. The Court said in *DeShaney*, "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." At 201. From that statement courts have concluded that liability exists when the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993). In *Wallace v. Adkins*, 115 F.3d 427 (7th Cir. 1997), we recognized that an order that a prison guard remain at his especially dangerous post, while at the same time offering him false assurances that he would be protected, qualifies as an affirmative act for purposes of a state-created danger claim. *See also Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990).

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998), involved a situation analogous to the one before us. In *Kallstrom* undercover police officers sought to prevent release of information about their addresses and phone numbers and those of their family members. The information was, nevertheless, released. The court found that the "City's actions placed the officers and their family members in 'special danger' by substantially increasing the likelihood that a private actor would deprive them of their

liberty interest in personal security." The officers' claims were "constitutionally cognizable." At 1067.

However, relying on *Wallace*, the City contends that it is also a requirement of a claim under the state-created danger theory that the state actor have cut off all avenues of self-help. The City then proceeds to argue that the evidence here does not support a finding that Monfils had no alternative means of self-help. We first note that the unobjected-to jury instruction in this case *included* a reference to self-help:

> The government may be held to have violated the Constitution if the government creates a dangerous situation or renders a person more vulnerable to danger while constricting reasonable avenues of self-help.
>
> The plaintiffs contend that Deputy Chief Taylor deprived Thomas Monfils of due process by rendering him more vulnerable to danger while constricting his reasonable avenues of self-help.

We also note that the jury could reasonably have concluded that once the tape was released, Monfils' ability to protect himself was severely limited. It's true he could have left the plant the morning he was killed. However, unlike the prison guard in *Wallace*, he would not necessarily have escaped his murderers by leaving; they, unlike the inmates in *Wallace*, were not confined to the location of the injury. Leaving the plant would not have solved Monfils' problem. It is, in fact, hard to see what more Monfils could have done to protect himself.

Most importantly, we note that by having the requirement regarding avenues of self-help included in the instructions, the City received a benefit it was not strictly entitled to. In a claim such as this one based on a state-created danger, there is no absolute requirement that all avenues of self-help be restricted. *Wallace*, the case on which the City relies, involved, as we have said, a prison guard. He was attempting to establish liability by claiming both that he had a "special relationship" with the state

because of his position as a guard and that prison officials placed him in a position of danger he would not otherwise have faced. The requirement that self-help be restricted went only to his claim of a special relationship. The basis of a special relationship is that the state has some sort of control or custody over the individual, as in the case of prisoners, involuntarily committed mentally ill persons, or foster children. The state's duty to protect those persons or to provide services for them arises from that custody or control. For a person not in custody to claim a special relationship, he must at least claim that the state had sufficient control to cut off other avenues of aid. Recently, in a case which seems to merge the two theories, we have required a finding that alternative avenues of aid have been cut off. *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir. 1997). *Wallace*, however, states no such requirement. We think *Wallace* correctly states the law of this circuit: a state can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of aid. As we said in *Wallace*, the elements of the claim are: "what actions did the prison officials affirmatively take, and what dangers would Wallace otherwise have faced?" At 430.

All of that said, we should now move to the real issue before us: Was the evidence sufficient for the jury to conclude that Taylor placed Monfils in a position of danger greater than he would otherwise have faced? For reasons which, we hope, will become clear, we pass that issue for now and turn instead to a discussion of "ratification" as that term is used in the jury's verdict.

As for the City's liability, Taylor's conduct is only one part of the issue; the other is whether the City "ratified" his conduct, conduct the jury found to be unconstitutional. It is well-established that a municipality is not liable under § 1983 unless a loss is caused by a municipal custom or policy. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). However, the precise bound-

aries of municipal liability have been fine-tuned. It is in the context of fine-tuning that "ratification" as a basis for municipal liability was set out in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). The plaintiffs assert that what *Praprotnik* holds is that

> [i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

At 127. There are, however, significant modifications to that bald statement. The Court also said:

> Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy.

At 130. Two examples are given of situations in which a supervisor could realistically be deemed to have adopted a policy which was formulated by a lower-ranking official. One is if the decision by a subordinate was "cast in the form of a policy statement and expressly approved by the supervising policymaker." At 130. The other is if a "series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware." At 130. What seems clear to us is that the mere fact that a supervisor failed to discipline a subordinate—the argument raised by the plaintiffs, for the City didn't demote or fire Taylor—does not a municipal policy make.

We think the evidence presented in this case was insufficient to establish municipal liability against the City of Green Bay under a theory of ratification. It's true that Chief Langan did not discipline his officers. Maybe he should have. But neither did he come close to ratifying their behavior so as to establish a municipal policy regarding how the release of the tape recording was handled. Rather, he expressed the view that what happened with the tape was "an unfortunate situation that so many things happened and nothing came together." He noted that in his view his officers acted in "good faith." What he really says is that he did not place blame on his officers,

not that he approved of their conduct to the extent that it rose to the level of a custom or policy of the City of Green Bay. The evidence was insufficient to establish ratification.

Accordingly, because there was no "ratification," the City of Green Bay cannot be held liable for a substantive due process violation. However, what about the issue of the liability of Deputy Chief Taylor?

As we have said, Taylor claims qualified immunity from suit. The district court denied his motion; he appealed. Our jurisdiction over an appeal from a denial of qualified immunity depends on the reasons for the denial—that is, we have no jurisdiction if the denial was based on the existence of disputed issues of fact. *Johnson v. Jones*, 515 U.S. 304 (1995); *Clash v. Beatty*, 77 F.3d 1045 (7th Cir. 1996). We ordered the district court to state the reasons for the denial and nothing in its subsequent opinion indicates that there were genuine issues of material fact which precluded summary judgment. Accordingly, the issue before us is a legal one: whether Taylor's conduct violates a constitutional right which was clearly established in 1992. In this circuit, a recognition of a claim based on a state-created danger precedes *DeShaney*, which was decided in 1989. In *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), we considered whether police officers may abandon children on the Chicago Skyway after arresting their custodian and depriving them of adult protection. We concluded they could not. We said that "such conduct indisputably breached the Due Process Clause." In other cases, we continued to recognize that a governmental official could, if the circumstances were right, be held responsible for creating a danger in a noncustodial setting. *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989). Our cases recognized that the constitutional right involved was not a right to protection, per se, but rather a right not to be placed at harm by state officials. In a case decided just after the events here, we reviewed the contours of the state-created danger theory and concluded:

> While we have been hesitant to find section 1983 liability outside the custodial setting . . . we find that plaintiffs such as the Reeds may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger [than] they otherwise would have been.

Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993). Taylor clearly created a danger and, by assuring Hitt (the assistant district attorney) that he would make sure the tape was not released but not following through, he created a danger Monfils would not otherwise have faced. Taylor is not and never was entitled to qualified immunity against this claim.

The sixty-four-dollar question which remains is what happens now—must there be another trial to determine if Taylor violated Monfils' right to substantive due process? Or should we answer the question we left unanswered earlier in our opinion: Is the evidence sufficient to show that Taylor violated Monfils' right to substantive due process and find the answer—whatever it is—binding as to the claim against Taylor individually? Neither party has spent much time considering this question. But because the jury trial proceeded while Taylor's appeal on the qualified immunity issue was pending, we are left with what turns out to be a thorny problem. We are dismayed that this case proceeded in a fashion which allowed this problem to arise.

The doctrine of qualified immunity, as it was redefined in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), led to the doctrine announced in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) that a "denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' . . . ." Taken together, the cases make clear that the purpose of the doctrine is to protect a defendant's "right not to *stand trial* on the plaintiff's allegations" if he has qualified immunity from suit. At 527.

And the fact is that everyone proceeded in this case as though Taylor's individual constitutional liability was not being tried. The following exchange occurred the first day of trial:

> MR. REAK (counsel for the defendants): Last thing, Your Honor, this does not pertain to a stipulation, but we received your order regarding the Taylor appeal this morning. We just wanted to state on the record by having Mr. Taylor here and allowing him to participate in the trial with respect to the negligence claims against him, we are not waiving our belief that the Court of Appeals now has jurisdiction over the constitutional claim against him and this court does not.
>
> THE COURT: All right, I don't think there's any problem with that. If he takes the stand of course he's subject to cross-examination like any other witness. So—
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> MR. REAK: We concede that, your Honor. But the issue of whether or not he violated Mr. Monfils' constitutional rights will not be going to the jury.

It is true that at trial Taylor was not the subject of a jury question as to a substantive due process violation. But, in what is a very important concern, he was the only person whose conduct was used to attempt to establish a substantive due process violation against the City. And the City, with the same lawyer representing it who represented Taylor (and the other officers) on the negligence claim against him, vigorously argued that Taylor's actions did not violate Monfil's constitutional rights. The question submitted to the jury was:

> Did the City of Green Bay violate the constitutional rights of Thomas Monfils not to be deprived of his life or liberty absent due process of law in one or more of the following ways:
>
> . . . .
>
> C. Ratification of unconstitutional conduct on the part of Chief Deputy Taylor?

The answer was "yes." The jury could not have answered "yes" to the question without concluding that Taylor violated Monfils' constitutional rights. And that is precisely the claim against him individually.

The unique situation presented here puts us in the position of having to determine whether the individual claim against Taylor must be tried—which would really be a second trial of the issue, or whether the verdict question, which by necessity includes a finding that Taylor's conduct was unconstitutional, if supported by sufficient evidence, will allow us to bypass another trial.

We begin to answer this question by looking at Taylor's role in the trial. First of all, we note that Taylor's appeal of the qualified immunity decision did not spare him a trial. His conduct was on trial. In addition, as we have noted, the attorneys who defended the case represented all of the defendants on all of the claims. They represented each of the individual officers who were involved in the negligence claims. Taylor was one of those officers, and the jury found that he was responsible for 40% of the causal negligence (more than any of the other individual defendants[2]) leading to Monfils' death. In addition, the same attorneys who tried the case represent Taylor on his appeal of the qualified immunity decision. Also important is the fact that Taylor's interest is identical to that of the City, and he is entitled, under Wisconsin law, to indemnification by the City (which, no doubt, is insured) for any award assessed against him. *See* § 895.46 Wis. Stat.

Taylor's actions played a major part in the trial. Dennis K. Waller, the plaintiffs' expert regarding police procedures, testified that Taylor knew Monfils was frightened and that Taylor took responsibility for preventing the release of the tape but did nothing about it. In contrast, the defendants' expert, John G. Peters, Jr., testified that in

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[2] The other negligence findings were: LaTour (25%); Servais (15%); Lampkin (10%); and Mason (10%). The jury found that Monfils was not negligent.

his opinion Taylor "followed generally accepted practices and conformed to the police department policy that was in effect."

Taylor testified fully regarding his actions. He acknowledged that the information in his possession indicated that the tape should not be released. And that being the case, the department's policy manual indicated that the chief of police should be contacted if release were to be denied. Taylor testified that he did not notify the chief, or the person serving in the capacity of chief, as the chief happened to be unavailable at the time. Taylor also acknowledged receiving a call from Hitt, who told him the tape should not be released. He also testified that he looked for a report and, finding none, did nothing. Rather than take steps to prevent the tape from being released, he went deer hunting. Finally, the closing arguments for both sides explored and analyzed Taylor's conduct. So even though the qualified immunity issue was on appeal, the fact of the matter is that Taylor's conduct was the subject of considerable attention during the trial. The individual constitutional claim against Taylor, given the very unusual circumstances of this case, was, for all intents and purposes, tried to this jury. And it was not only tried in a legalistic, technical sense; in reality, the issue was tried in full, for Taylor's lawyers argued that his conduct, in all respects, was blameless.

In the unique circumstances of this case, we see a number of problems if the matter is now sent back to the district court for another trial (which would actually be a retrial) of the due process claim against Taylor individually. If the case against Taylor is tried again, a risk of inconsistent verdicts arises. We would also be running afoul of principles of judicial economy and, we think, fairness. We will, therefore, proceed to answer the as-yet unanswered question as to whether the evidence was sufficient for the jury to conclude that Taylor placed Monfils in a position of danger greater than he would otherwise have faced. We will then go on to explain why our answer to that question is "yes."

To repeat ourselves, Taylor knew of the increased danger, for he talked to Monfils about it. He was told by Hitt that the tape fell within an exception to the Open Records Law and should not be released. He assured Hitt that he would prevent its release, but he nevertheless allowed it to get out, which, in turn, allowed Kutska to identify Monfils as the informant. As an experienced police officer, Taylor knew the dangers informants face. Given these facts, it is hard to imagine how the jury could have failed to conclude that Taylor placed Monfils in a position of heightened danger. The evidence is sufficient to uphold that part of the verdict based on Taylor's unconstitutional conduct. We conclude that the jury has in effect made a finding that Taylor violated Monfils' substantive due process rights. Weighing all the factors and, above all, emphasizing that our conclusion grows out of the unique posture of the case—a posture we recommend that district courts attempt to avoid in the future—we find, based on the principle of law of the case, that the jury's finding of "unconstitutional conduct on the part of Chief Deputy Taylor" (verdict question 1AC) is binding as to the claim against Taylor in his individual capacity.

The law of the case doctrine is a flexible rule, which "merely expresses the practice of courts generally to refuse to reopen what has been decided . . . ."; it is "not a limit on their power." *Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

It is, however, a "rule of practice, based on sound policy." *Creek v. Village of Westhaven*, 144 F.3d 441 (7th Cir. 1998). Once an issue is litigated and decided, "that should be the end of the matter." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). We have recently discussed whether a determination in a summary judgment decision regarding the amount of a setoff should prevent, on law-of-the-case grounds, submission of that issue to the jury. We determined that it was not error to allow the jury to re-decide the issue. We stated that the "presumption that a ruling made at one stage of the proceedings will be adhered to

throughout the suit" was one "whose strength varies with the circumstances; it is not a straightjacket." *Alston v. King*, 157 F.3d 1113, 1116 (7th Cir. 1998), quoting *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219 (7th Cir. 1995). Unlike that case, in the case before us today the circumstances give the presumption great strength.

Furthermore, the most compelling application of the doctrine occurs when a court of appeals has decided an issue. Then the district court is required to comply with the express or implied ruling of that court. *Waid v. Merrill Area Pub. Sch.*, 130 F.3d 1268 (1997). Ordinarily, there would be no question that our decision that the verdict of the jury is supported by sufficient evidence is controlling on the district court.

In this case, though, we remain mindful that the constitutional claims against Taylor individually were, at least technically speaking, not tried. However, Taylor and the City were in privity. And the concept of privity, along with the principles of res judicata and collateral estoppel,[3] supports our conclusion that this case should not be tried a second time. On top of that, the concept of what is sometimes called "virtual representation" comes into play.

> Under the doctrine of virtual representation, "'a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to his virtual representative.'"

In the Matter of L & S Industries, Inc., 989 F.2d 929, 933 (7th Cir. 1993), quoting *Kerr-McGee Chem. Corp. v. Hartigan*, 816 F.2d 1177 (7th Cir. 1987). Just the other day, we noted that the theory of "virtual representation" has serious limitations in the context of collateral estoppel

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[3] We have recently said, "The doctrine of res judicata limits relitigation of an issue in a subsequent suit. The doctrine of law of the case limits relitigation of an issue at a subsequent stage of the same suit." *Payne v. Churchich*, ___ F.3d ___, 1998 WL 774833 (7th Cir. 1998).

where parties in a case were claimed to have been "virtually represented" by different parties in a completely different case. *Tice, et al. v. American Airlines, Inc.*, 1998 WL 877779 (7th Cir., Dec. 17, 1998). But the theory is not lifeless in the context of our case. We think it explains a good deal about the privity between the parties in our case. For instance, one fact looked to in determining whether virtual representation exists is whether "representation of a non-party falls within some pre-existing relationship—as defined by statute, for example . . . ." *L & S Industries*, at 933.

That is precisely what we have here. By statute, the City of Green Bay must indemnify Taylor. That fact, plus all the other factors we have mentioned, indicate clearly that the City of Green Bay was Taylor's virtual representative. Their interests were in privity. Justice and fairness require that Taylor be bound by the jury's verdict, which we have just decided is supported by substantial evidence.

The other claim against the City of Green Bay is an equal protection claim that the City had a policy of treating persons who called the department and gave their name differently from those who called and remained anonymous. There is no evidence from which a rational jury could conclude that such a policy existed. In fact, Officer Wickman, who took the November 12th call, had to consult with a superior because she had not taken a call like this before. The verdict against the City of Green Bay on the equal protection claim must be set aside.

We now turn to state law claims. The defendants do not contest the verdicts against them premised on negligence law. They do, however, contend that under Wisconsin law they are entitled to discretionary act immunity.

Public officials in Wisconsin are immune from tort liability for acts performed in the scope of their official authority and in the line of their official duties. *Cords v. Anderson*, 80 Wis. 2d 525 (1977). Exceptions to immunity include violations of a ministerial duty. In addition, sometimes once a discretionary decision is made, carrying out

that decision may be purely ministerial. *Chart v. Dvorak*, 57 Wis. 2d 92 (1973). So it is crucial here to characterize the duty the defendants had.

The police policy said that the employees of the department shall treat as confidential all confidential information—not a particularly helpful policy. Reasons that may justify denying the release of information include protection of witnesses and informants. Requests that employees deemed proper for denial were to be referred to the chief's office with an explanation as to why they should be denied. The chief would then decide whether to deny access. The actions of the defendants fall within the ministerial exception to discretionary act immunity, and the negligence findings against them will not be set aside.

In summary, we vacate the finding that the City of Green Bay violated Thomas Monfils' constitutional rights to due process or equal protection. We direct that judgment be entered against Taylor on an individual claim against him consistent with the jury's answer to question 1C on the verdict, and we affirm the judgment on the negligence claims and the damage findings. The case is remanded to the district court for the entry of judgment consistent with this opinion. Costs are awarded to the plaintiffs-appellees.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 95-C-1239

SUSAN MONFILS, As Special Administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS By BRUCE R. BACHHUBER, Their Guardian Ad Litem,

Plaintiffs,

v.

CITY OF GREEN BAY, CITIES AND VILLAGES MUTUAL INS. CO., DEPUTY CHIEF JAMES TAYLOR, JOHN LAMPKIN, MICHAEL MASON, KEN LATOUR, JUDITH SCHMIDT-LEHMAN, and DENISE SERVAIS,

Defendants.

SPECIAL VERDICT

We, the Jury in the above-entitled case, having been duly impaneled and sworn to try the issues, find for our special verdict as follows:

QUESTION NO. 1:

Did the City of Green Bay violate the constitutional rights of Thomas Monfils not to be deprived of his life or liberty absent due process of law in one or more of the following ways:

A. Constitutionally inadequate training?

Yes ____ No X

B. A custom or policy that caused the constitutional deprivation of Thomas Monfils' rights?

Yes ____ No _X_

C. Ratification of unconstitutional conduct on the part of Chief Deputy Taylor?

Yes _X_ No ____

QUESTION NO. 2:

If you have answered "yes" to either subparts A, B, or C, of Question No. 1, then answer this question.

Was such conduct a proximate cause of the injuries to Thomas Monfils?

Yes _X_ No ____

QUESTION NO. 3:

Did the City of Green Bay deprive Thomas Monfils of his right to equal protection under the law?

Yes _X_ No ____

QUESTION NO. 4:

If you answered Question No. 3 "yes," then answer this question.

Was such conduct a proximate cause of the injuries to Thomas Monfils?

Yes _X_ No ____

QUESTION NO. 5:

Were the following persons negligent with respect to Thomas Monfils' safety?

A. Denise Servais Yes _X_ No ____

B. Kenneth LaTour Yes _X_ No ____

C. John Lampkin Yes X No ___

D. Michael Mason Yes X No ___

E. James Taylor Yes X No ___

If you answered "yes" to any of the subparts of Question No. 5, then answer this question.

QUESTION NO. 6:

Was such conduct a cause of the injuries to Thomas Monfils?

A. Denise Servais Yes X No ___

B. Kenneth LaTour Yes X No ___

C. John Lampkin Yes X No ___

D. Michael Mason Yes X No ___

E. James Taylor Yes X No ___

QUESTION NO. 7:

Was Thomas Monfils negligent with respect to his own safety?

Yes ___ No X

QUESTION NO. 8:

QUESTION NO. 8: [sic]

If you have answered Question No. 7 "yes," then answer this question.

Was such negligence a cause of the injuries to Thomas Monfils?

Yes ___ No ___

QUESTION NO. 9:

If, and only if, you have answered "yes" to any of the subparts of Question No. 6 and Question No. 8, then answer this question. You are to answer this question only if you have found that one or more of the parties named in Question No. 6 and the party named in Question No. 8 were causally negligent. If, by your previous answers, you are required to answer this question, you will answer the subdivisions thereof, assigning to each person such percentage, or part of 100%, which you find to a reasonable certainty is attributable to that party. You will determine how much and to what extent each party is to blame for the injuries to Tom Monfils and whether the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault that the party contributed to cause Tom Monfils' injuries.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other.

A. Denise Servais	15 %
B. Kenneth LaTour	25 %
C. John Lampkin	10 %
D. Michael Mason	10 %
E. James Taylor	40 %
F. Thomas Monfils	0 %
TOTAL	100%

QUESTION NO. 10:

What sum of money, if any, will reasonably and fairly compensate the Estate of Thomas Monfils for:

A. Thomas Monfils' pain and suffering $140,000

B. Thomas Monfils' burial and funeral expenses (answered by the court) $7,494.85

QUESTION NO. 11:

What sum of money, if any, will reasonably and fairly compensate Susan Monfils for:

A. Her loss of society and companionship? $25,000

B. Her mental pain and suffering that resulted from her husband's death? $75,000

C. Her loss of support and services? $538,000

QUESTION NO. 12:

What sum of money, if any, will reasonably and fairly compensate Theresa Monfils for:

A. The pecuniary loss suffered by her $225,000

B. Her loss of society and companionship $200,000

C. Her mental pain and suffering that resulted from her father's death $225,000

QUESTION NO. 13:

What sum of money, if any, will reasonably and fairly compensate John-Thomas Monfils for:

A. The pecuniary loss suffered by him $225,000

B. His loss of society and companionship $200,000

C. His mental pain and suffering that resulted from his father's death $225,000

We, the jury unanimously find the facts to be as indicated in our answers to the foregoing questions.

Dated this 27 day of June, 1997.

/s/ Thomas Ball
Foreperson

/s/ Patricia A. Holzbauer
Juror

/s/ Betty J. Prange
Juror

/s/ Wesley R. Bond
Juror

/s/ Patricia Rische
Juror

/s/ Daniel Otto
Juror

/s/ Frederick M. Stepp, Jr.
Juror

/s/ Barbara A. Vasko
Juror

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: December 23, 1998

BEFORE:

Honorable JOEL M. FLAUM, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

Nos. 97-2338 & 97-4179

SUSAN MONFILS, as Special Administrator of the Estate of THOMAS MONFILS, SUSAN MONFILS, By Bruce R. Bachhuber, Guardian ad litem, THERESA MONFILS, By Bruce R. Bachhuber, Guardian ad litem, et al.,

Plaintiffs-Appellees,

v.

JAMES TAYLOR,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 95 C 1239, Thomas J. Curran, Judge.

In summary, we VACATE the finding that the City of Green Bay violated Thomas Monfils' constitutional rights to due process or equal protection. We direct that

judgment be entered against Taylor on an individual claim against him consistent with the jury's answer to question 1C on the verdict, and we AFFIRM the judgment on the negligence claims and the damage findings. The case is REMANDED to the district court for the entry of judgment consistent with this opinion. Costs are awarded to the plaintiffs-appellees. The above is in accordance with the decision of this court entered on this date.

App. 29

[Dated May 12, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 95-C-1239

SUSAN MONFILS, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF THOMAS MONFILS, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS BY BRUCE R. BACHHUBER, THEIR GUARDIAN AD LITEM,

Plaintiffs,

v.

CITY OF GREEN BAY, CITIES AND VILLAGES MUTUAL INS. CO., DEPUTY CHIEF JAMES TAYLOR, JOHN LAMPKIN, MICHAEL MASON, KEN LATOUR, and DENISE SERVAIS,

Defendants.

DECISION AND ORDER

Having reviewed the second motion for summary judgment filed by the Defendants in the above-captioned case as well as the renewed first motion for summary judgment, the court concludes that most of the material facts of this case are in dispute and that a resolution of these disputes must be made by a jury. *See* Federal Rule of Civil Procedure 56.

In regard to the newly added claims for breach of contract and promissory estoppel, the Plaintiffs' notice-of-claim substantially complied with Section 893.80 of

the Wisconsin Statutes. *See DNR v. City of Waukesha*, 184 Wis.2d 178, 515 N.W.2d 888 (1994). The Plaintiffs' timely notice sets forth the underlying facts supporting these claims and a specific dollar amount of damages sought. *See* Supplemental Affidavit of Kevin P. Reak at Exhibit D. Under these circumstances, these state law claims will not be dismissed for failure to give the statutory notice.

For these reasons, the court ORDERS that the "Defendants' Motion for Summary Judgment on Newly Added Claims" (filed April 1, 1997) IS DENIED.

IT IS FURTHER ORDERED that the Defendants' "Motion for Summary Judgment" (filed November 20, 1996 and renewed) IS DENIED.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 12th day of May, 1997.

/s/ Thomas J. Curran
United States District Judge

[Dated June 30, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 95-C-1239

SUSAN MONFILS, as Special Administrator of the ESTATE OF THOMAS MONFILS, SUSAN MONFILS, THERESA MONFILS and JOHN-THOMAS MONFILS By BRUCE BACHHUBER, Their Guardian Ad Litem,

v.

CITY OF GREEN BAY, CITIES AND VILLAGES MUTUAL INS. CO., DEPUTY CHIEF JAMES TAYLOR, JOHN LAMPKIN, MICHAEL MASON, KEN LATOUR and DENISE SERVAIS,

---

[X] Jury Verdict. This action came on for trial before the court and a jury, the Honorable Thomas J. Curran, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED

that the Estate of Thomas Monfils recover of the Defendants City of Green Bay, Cities and Villages Mutual Ins. Co., Deputy Chief James Taylor, John Lampkin, Michael Mason, Ken LaTour, and Denise Servais the following sums for the following losses:

1.	pain and suffering	$ 140,000.00
2.	burial and funeral expenses	$ 7,494.85

that Plaintiff Susan Monfils recover of the Defendants City of Green Bay, Cities and Villages Mutual Ins. Co., Deputy Chief James Taylor, John Lampkin, Michael Mason, Ken LaTour, and Denise Servais the following sums for the following losses:

1.	pain and suffering	$ 25,000.00
2.	mental pain and suffering resulting from Thomas Monfils' death	$ 75,000.00
3.	loss of support and services	$ 538,000.00

that Plaintiff Theresa Monfils recover of the Defendants City of Green Bay, Cities and Villages Mutual Ins. Co., Deputy Chief James Taylor, John Lampkin, Michael Mason, Ken LaTour, and Denise Servais the following sums for the following losses:

1.	pecuniary loss	$ 225,000.00
2.	loss of society and companionship	$ 200,000.00
3.	mental pain and suffering	$ 225,000.00

that Plaintiff John Thomas-Monfils recover of the Defendants City of Green Bay, Cities and Villages Mutual Ins. Co., Deputy Chief James Taylor, John Lampkin, Michael Mason, Ken LaTour, and Denise Servais the following sums for the following losses:

1.	pecuniary loss	$ 225,000.00
2.	loss of society and companionship	$ 200,000.00
3.	mental pain and suffering	$ 225,000.00

IT IS FURTHER ORDERED that the Plaintiffs are awarded postjudgment interest on these sums at the rate provided by law and their costs of this action.

IT IS FURTHER ORDERED that this action is dismissed.

APPROVED:
/s/ Thomas J. Curran
United States District Judge

Date:
June 30, 1997

Dated:
June 30, 1997

SOFRON B. NEDILSKY, Clerk
/s/ D. McLeod
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 28, 1999

Before

Hon. Joel M. Flaum, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 97-2338 & 97-4179

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Plaintiffs-Appellees,

v.

JAMES TAYLOR, CITY OF GREEN BAY, a municipal corporation, CITY OF GREEN BAY POLICE DEPT., CITIES AND VILLAGES MUTUAL INSURANCE COMPANY, a Wisconsin insurance corporation, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 95-C-1239—Thomas J. Curran, Judge.

ORDER

On January 11, 1999, defendant-appellant James Taylor filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel

have voted to deny the petition, and none of the judges in active status have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Supreme Court, U.S.
FILED
JUN 29 1999
CLERK

No. 98-1744

In The

Supreme Court of the United States

JAMES TAYLOR,

Petitioner,

v.

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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3318

QUESTION PRESENTED

Did the Court of Appeals err by finding a police official liable under the state-created danger theory of substantive due process liability based on *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) and its progeny, where the evidence demonstrates that the official acted affirmatively to render a confidential citizen informant more vulnerable than he would otherwise have been to a danger that had been created and enhanced by subordinate members of the official's own police department, and then failed to protect that citizen from this increased danger, resulting in the citizen's brutal beating and murder?

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OPINIONS BELOW

Defendant Taylor's Petition omits the district court's Decision and Order denying defendants' post-trial motions for judgment or new trial and the resulting November 24, 1997, amended final judgment, from which defendants appealed on December 17, 1997. These documents are attached in the Appendix to this Brief, at pages 1 and 5, respectively.[1]

STATEMENT OF THE CASE

On the afternoon of November 20, 1992, the Green Bay, Wisconsin, Police Department gave Keith Kutska a taped copy of Tom Monfils' anonymous call reporting Kutska's planned theft from the paper mill where both worked. Kutska identified Monfils from the tape, and early the next morning Kutska and five co-workers brutally beat Monfils, tied a 50-pound weight to his neck, and threw him, still alive, into a two-story pulp vat to drown. His body was found the next evening, mutilated below the thighs by the stirring propeller at the bottom of the vat. Kutska and his accomplices were convicted of first degree murder. Susan Monfils, whose children were 9 and 11 years old when her husband was murdered, lost all hope and attempted suicide.

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[1] Page references to this Appendix are denoted "Resp. App. [page number]." References to the Court of Appeals' Opinion and other documents contained in the Appendix to Taylor's Petition are denoted "Pet. App. [page number]."

Five years later, a jury found Green Bay Deputy Police Chief James Taylor liable for a violation of Tom Monfils' substantive due process rights for Taylor's central role in the release of the tape that revealed Monfils' identity to his killers. The jury awarded $2 million in compensatory damages to Monfils' widow and children. Taylor now petitions this Court to overturn this verdict on the ground that his role in this tragedy was entirely passive and thus invulnerable to constitutional liability.

A. Factual Background

The Petition's statement of "Factual Background" indulges in an aggressive misrepresentation of the true facts of this case that is carefully calculated to suggest that Taylor and other Police officials knew less and did less than was actually the case and that Monfils was himself somehow complicit in his own death. Petitioner has also ignored the rule that a reviewing court, particularly this Court, must view the evidence in the light most favorable to plaintiffs, providing plaintiffs with the benefit of all inferences that the evidence fairly supports.[2] Applying that standard, the evidence in this case reveals a true set of facts, as set forth below, that fully supports the Court of Appeals' finding of constitutional liability.

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[2] As the Court of Appeals correctly noted (Pet. App. 7), the issue defendants presented to it regarding Taylor's conduct challenged only the sufficiency of the evidence: "Is there sufficient credible evidence to support a finding that Deputy Chief Taylor violated Mr. Monfils' constitutional rights . . . ?" (Brief and Short Appendix of Appellants in Appeal No. 97-4179, p. 2.)

Early on November 10, 1992, Tom Monfils learned Keith Kutska planned a theft from the James River Paper Mill. Knowing Kutska was violent and a thief, Monfils called Green Bay Police anonymously to report the planned theft. (Ex. 4, 5).

The Police dispatcher, Michelle Wickman, agreed to take Monfils' information on condition that he remain anonymous. Wickman was aware that the call was taped, but she did not tell Monfils this or ask his consent to be recorded. (Ex. 5; Tr. 153).

Monfils reported Kutska's intended theft, adding that Kutska was violent and could fly off the handle if confronted. Monfils asked Wickman to call the mill's security office to assure that his involvement in reporting the crime would remain confidential. Wickman did so (Ex. 7, pp. 1, 2), and when plant security confronted Kutska he refused a search, for which he was suspended for five days without pay. (Tr. 169-70, 434-35).

Frightened that Kutska would find out he had reported Kutska to the Police, Monfils called the Police Department on November 12 and told Detective Denise Servais about the anonymous complaint he had made to the Department. Monfils told Servais that Kutska was irrational and violent. He was worried Kutska would find out he had reported him. Servais told Monfils there was "no way in hell" the tape of his call would get out. (Ex. 9, p. 5; Ex. 10).

Kutska called the Department on the morning of November 17 to find out if there was a record of the call that turned him in. Kutska told defendant Michael Mason, a lieutenant in administration who did not work

in the Records Office (Tr. 435-36, 513, 539), that he had been falsely accused of theft and wanted to confront the person who had accused him. (Tr. 436-37, 544-45, 557). Mason told Kutska that he would need to know the time of the call in order to locate the recording. (Tr. 437). At work that same day, Kutska learned the time of the call and announced to his co-workers, in Monfils' presence, that he was getting a copy of the tape. (Tr. 438, 1106-07).

Fearing that Kutska would get the tape, Monfils called the Department a third time on November 17 and asked to speak to the Department's highest on-duty authority. Monfils was connected to acting Shift Commander Lt. Ken LaTour (Ex. 9, p. 1; Tr. 203-04), to whom he described his original anonymous complaint. Monfils told LaTour that the man he reported was trying to get a tape of the call and would recognize Monfils' voice if he was given the tape. Monfils confirmed that the original call was to remain anonymous, emphasizing Kutska's violent nature to LaTour and the danger that Monfils would be badly hurt or killed if the tape were released. (Ex. 9, pp. 1, 2, 6-8). LaTour understood that Monfils feared for his life and safety if the tape were released. (Tr. pp. 224-25). LaTour told him the tape should not get out, and told Monfils to call Specialist John Lampkin, who worked with the tapes, to assure that it would not be released. (Tr. 217; Ex. 9, pp. 4, 5).

On November 18 Monfils called the Department for the fourth time. As directed by LaTour, he spoke to Specialist Lampkin and told him about his anonymous report and his fear that the tape would be released. Lampkin told him the tape would not be released. (Tr. 581-84).

On the morning of November 19, Kutska called Lt. Mason and gave him the time of Monfils' original report to the Department. Mason then checked the master recording for that day and quickly located and listened to Monfils' call. (Tr. 514-15, 538). Mason consulted Records Office Manager Shay Gierczak, who was unsure whether the tape could be released and called Assistant City Attorney Judith Schmidt-Lehman. (Tr. 551-52). Mason, the only one of the three who had listened to the tape, told Schmidt-Lehman incorrectly that the caller had received no promise of confidentiality, and she told him the tape could be released. (Tr. 554, 558). Mason called Kutska back that afternoon and told him that he could pick up the copy of the tape the next day, November 20. (Tr. 554).

On the morning of November 20 Monfils heard that Kutska was bragging that he would be picking up a copy of the tape after work that day. (Tr. 441). At approximately 10:00 a.m. Monfils called the Department for the fifth time and spoke again to Specialist Lampkin, repeating his fear and concern about the tape. Lampkin told him again that the tape would not be released and transferred him to petitioner James Taylor, one of the Department's three Deputy Chiefs. (Tr. 581-84).

Monfils told Taylor about his November 10 report of theft to the Police and his insistence that it remain anonymous. (Tr. 610, 615; Ex. 15). He told Taylor that Kutska was going to get a tape of the call from the Police, from which he could identify Monfils, and that Monfils would be in grave danger from Kutska if the tape was actually released. Taylor realized that Monfils feared greatly for his safety if Kutska and his co-workers found out that he

had called the Police, and he concluded without hesitation that the tape should not be released. Taylor assured Monfils that the tape would not be released.[3] (Tr. 596, 597, 637).

Still afraid, Monfils spoke to Brown County Assistant District Attorney Pat Hitt. Monfils described his anonymous report and Kutska's effort to get the tape (Tr. 656-59), and he told Hitt that he had already spoken with Lampkin and Taylor. Monfils told Hitt that Kutska was violent and dangerous and could identify Monfils from the tape, and he repeated several times that he would be in serious danger if the tape was released. (Tr. 658-59, 669).

Hitt concluded immediately that the caller was a confidential police informant seeking protection of his identity (Tr. 658, 666, 669, 680-681), and that the tape was exempt from release under Wisconsin's Open Records Law and should not be given to Kutska. (Tr. 685).[4] Hitt

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[3] Although Taylor claims Monfils did not mention anything about his fear of Kutska, Taylor's 'report' and recollection of that phone conversation is implausible and grossly incomplete. Compare Taylor's testimony to Servais' report (Ex. 10) (crazy and a biker type, great fear), Lt. LaTour's taped conversation (fear of being murdered), and Monfils' phone conversation with Hitt, just minutes after Taylor's, during which he told Hitt several times how fearful he was. (Ex. 9, pp. 6-8, Tr. 658, 669) Lastly, Taylor did not deny that Hitt told him of Monfils' fear, but merely claimed that he could "not recall". (Tr. pp. 607, 659).

[4] The Wisconsin Open Records Law contained exemptions for the release of records that would endanger an individual's life or safety, or records that would identify a confidential informant. § 19.35(1)(am)2a and b, Wis. Stats. (1991-92). Furthermore, the Department's own policies specified that

decided that he would intervene himself to prevent the tape's release, by calling both Taylor and Lampkin to inform them that the tape was exempt and should not be released without his prior authorization. (Tr. 659-662, 673). Hitt told Monfils that he would call Deputy Chief Taylor and tell him not to release the tape. (Tr. 659, 672).

Hitt believed that he had undertaken a duty to protect the caller. (Tr. 675). Hitt immediately called Taylor, who confirmed his familiarity with the situation. Telling Taylor that the caller sounded scared, Hitt informed Taylor that the tape was exempt from disclosure under Wisconsin law, and he instructed Taylor to take steps to prevent the tape's release. (Tr. 660-61, 678-79).

After Taylor confirmed that Specialist Lampkin worked with the tapes (Tr. 660-61), Hitt offered to call Lampkin to make sure the tape was not released. Taylor replied that he would take care of it, and he assured Hitt that the tape would not be released. The conversation ended, and Hitt concluded that the matter was taken care of and that Taylor would contact Lampkin and prevent release of the tape. Hitt therefore did nothing further to intervene. (Tr. 660-61, 672).

Had Hitt called Lampkin and told him not to release the tape, Lampkin would have directed Hitt to Records Office Manager Shay Gierczak or would have contacted her himself. (Tr. 573-74, 577, 675-76). In either case, Hitt's

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protection of a witness or an informant was sufficient reason to deny the request for a record (Ex. 17, p. 3), and that any request for a record that "may" be denied must be denied. (Ex. 18, § I, ¶¶ G, H).

instruction not to release the tape would have been given to Gierczak, and Kutska's request for the tape would have been denied. Because of her involvement with the matter the day before, Gierczak was fully aware that the tape had been copied and was sitting on a secretary's desk in Gierczak's office where Kutska was to pick it up that afternoon. (Tr. 551-54).

After telling Hitt that he need not contact Lampkin and that Taylor would take care of the matter, Taylor checked the Department's computer system for a report of Monfils' November 10 call. (Tr. 613-14). Finding none, Taylor decided to take no further action to prevent the impending release of the tape to Kutska. He made no effort to contact Lampkin or to inquire about the tape at the Records Office, where Gierczak had the tape, less than 30 feet from Taylor's office. (Tr. 600-601; Ex. 117, p. 2 ¶ 3).[5]

Four hours later, Kutska picked up the tape from the Records Office. (Tr. 441-42). Before the Police gave him the tape, Kutska had suspected five or six people of turning him in and had no intention of confronting Monfils. (Tr. 450-51). With the tape, Kutska immediately identified Monfils as his accuser. The next day Kutska and five co-workers brutally beat Tom Monfils, tied a 50-pound weight to his neck, and threw him, still alive, into

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[5] Taylor claimed that Monfils actually called on November 18, because he was an avid deer hunter and, thus, he was not at work on Friday, November 20 because it was the day before deer hunting season began. (Tr. 635). Even if true, this explanation hurts Taylor because it means he had more than two days to act on Hitt's instructions rather than four hours.

a pulp vat, where his mutilated body was found the next night. (Tr. 498, 845, 1099).

Monfils left a widow and two children, ages 9 and 11. Susan Monfils became so despondent after his murder that she attempted suicide. (Tr. 952-53, 955). The jury awarded the family just over $2 million in compensatory damages, which defendants have never challenged on appeal. The jury was not asked to consider punitive damages and none were awarded.

B. Procedural History

The Petition's Procedural History omits several relevant aspects of this case. On the Special Verdict form, the jury attributed 40 percent of the blame for Tom Monfils' death to defendant Taylor, more than any other defendant. The jury also found that Monfils himself was not contributorily negligent with respect to his own safety. (Pet. App. 23-24.)

After the district court entered judgment on June 30, 1997, defendants moved for judgment as a matter of law under Rule 50(b) or for a new trial under Rules 50(b) and 59. The district court denied these motions, stating that the evidence supporting plaintiffs' theory of liability was "overwhelming" and "more than sufficient to support the verdict." (Resp. App. 3, 4.) Defendants appealed from the amended judgment reflecting this ruling, entered on November 24, 1997. (Resp. App. 5, 6.)

After the Court of Appeals had issued its decision and its subsequent denial of Taylor's request for

rehearing and review *en banc*, Taylor moved to stay issuance of the Court's mandate, arguing that the challenge he now raises in his Petition would present this Court with a substantial question for review. The Court of Appeals refused a stay and issued its mandate to the district court on February 4, 1999.

ARGUMENT FOR DENYING THE WRIT

Taylor has made no attempt to base his Petition on any conflict among the Courts of Appeals, nor could he. As Taylor himself concedes, the state-created danger theory of substantive due process liability based on *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) has been recognized by the great majority of the circuits,[6] and

[6] *E.g., Soto v. Flores*, 103 F.3d 1056, 1063-65 (1st Cir. 1997); *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir. 1993); *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1373-75 (3d Cir. 1992); *Kneipp v. Tedder*, 95 F.3d 1199, 1207-1208 (3d Cir. 1996); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998); *Losinski v. County of Trempealeau*, 946 F.2d 544, 549-51 (7th Cir. 1991); *Reed v. Gardner*, 986 F.2d 1122, 1125-26 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990); *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc); *Wood v. Ostrander*, 879 F.2d 583, 589-95 (9th Cir. 1989), *cert. denied*, 489 U.S. 938 (1990); *L.W. v. Grubbs*, 974 F.2d 119, 121-22 (9th Cir. 1992); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996); *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 354-56 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990). In *Pinder v. Johnson*, 54 F.3d 1169, 1176-78 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 994 (1995), the Fourth Circuit Court of Appeals left unclear whether it would recognize this theory of liability but clearly

Taylor can point to no well-developed split of authority under this theory that could appropriately be resolved by granting certiorari in this case.

Instead, Taylor seeks to justify certiorari by claiming that the Court of Appeals' opinion conflicts with *DeShaney* and the decisions following it in the Seventh Circuit and elsewhere, by improperly expanding the scope of substantive due process to reach state conduct that consists solely of "inaction" in the face of private danger. Taylor can make this argument, however, only by pretending that the conduct at issue here consisted of nothing more than a "failure to take more affirmative steps" to protect Tom Monfils and that the court below found such inaction sufficient, in itself, to violate the Due Process Clause.

This is an egregious misrepresentation of what has occurred in this case. As any fair reading of the evidence and decision below demonstrates, Tom Monfils was placed in mortal danger, far greater than he would otherwise have faced, by the affirmative acts of Deputy Chief Taylor himself and other state actors of whose conduct Taylor was fully aware. This case is thus squarely consistent with *DeShaney* and its progeny, and a grant of certiorari to resolve petitioner's illusory "conflict" with this law would be futile and improvident.

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acknowledged the extent to which the courts in other circuits had done so.

THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH *DESHANEY*, AND THERE IS THEREFORE NO CONFLICT REQUIRING RESOLUTION BY THIS COURT

DeShaney made clear that the Due Process Clause imposes no affirmative obligation on the state to protect its citizens against the danger of private violence from other citizens when the state itself has played no part in creating such danger. A citizen therefore has no constitutional right to demand protection from such danger, and the state's failure to provide such aid – even when the danger is clearly known and the state has given assurance of protection – "simply does not constitute a violation of the Due Process Clause." 489 U.S. at 194-97, 201-203. In such a case, the Court made clear, "[t]he most that can be said of the state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203.

But Monfils did not face a purely private danger of this kind, in which the state had played no role. He did not come to the Green Bay Police telling them that some private person – a co-worker, for example – had overheard him reporting Keith Kutska's theft and was about to reveal Monfils' identity to Kutska. Monfils did not ask the Police to provide protective services against the danger this private action posed – by questioning Kutska, for example, or placing him under surveillance, or by intervening with the co-worker to prevent disclosure of Monfils' identity. Nor is this a case in which the Police first assured Monfils of such protection from purely private danger but then "stood by and did nothing" to provide it.

Instead, this is a case in which the state knew of the dangers Keith Kutska posed to Monfils and also "played [a] part in their creation" and "render[ed] him . . . more vulnerable to them." *Id.*, 489 U.S. at 201. *DeShaney* and numerous Seventh Circuit decisions make clear that where the state itself has played an active role in creating or enhancing the danger to a citizen – including the danger of violence by other, private actors – the state does then owe an affirmative duty of protection to that citizen. *Id.* at 197, 201; *Losinski v. County of Trempealeau*, 946 F.2d at 549-51 ("The essence of the Court's exception in *DeShaney* is state creation of dangers faced or involuntary subjection to known risks"); *Reed v. Gardner*, 986 F.2d at 1125-27 (liability, under *DeShaney*, if officers "knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger"); *Wallace v. Adkins*, 115 F.3d 427, 428-29 (7th Cir. 1997) ("affirmative duty of care and protection on the part of the State" exists, under *DeShaney*, when the state "affirmatively places the individual in a position of danger the individual would not otherwise have faced"). *See also Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989) ("When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk").

The cases articulating this state-created danger doctrine also clearly recognize that, after the state has acted to create a danger or to render a citizen more vulnerable to an existing danger, the resulting affirmative duty to protect the citizen from that danger may be violated as much by *inaction* – by "doing nothing" to fulfill that

affirmative duty – as by further affirmative acts. Chief Judge Richard Posner captured this aspect of the rule exactly in a seminal pre-*DeShaney* passage that has been widely quoted since *DeShaney* was handed down:[7]

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Echoing this theme, decisions in the Seventh and other circuits have made clear that official inaction in the face of a danger that the state has played an affirmative role in creating will suffice to establish substantive due process liability. *E.g., Gibson v. City of Chicago*, 910 F.2d at 1521 n. 19 (city could be liable where police "affirmatively trained and outfitted" officer with firearms, but then "failed to recover that equipment" after officer was found unfit for duty); *Dwares v. City of New York*, 985 F.2d at 99 (police officers liable where they "conspired with" skinheads to permit beating of demonstrators and then allowed prolonged assault "without interfering with the

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[7] *E.g., D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d at 1374; *Kneipp v. Tedder*, 95 F.3d at 1207; *Kallstrom v. City of Columbus*, 136 F.3d at 1066; *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 n. 19 (7th Cir. 1990); *Wood v. Ostrander*, 879 F.2d at 594; *Uhlrig v. Harder*, 64 F.3d at 572 n. 6; *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d at 354.

attack"); *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d at 357-58 (government officials liable where they "affirmatively acted" in bringing prison inmates into community but then "did nothing to alleviate or protect against the danger").

No matter how much Taylor may wish to obscure the fact, this case falls squarely within these straightforward rules, and the decision below is thus wholly consistent with *DeShaney* and its progeny. In this case it was the state *itself*, through the affirmative acts of Deputy Chief Taylor and other Police personnel subordinate to him, that first created and then proceeded to produce for Keith Kutska the sole means by which he could discover Monfils' identity, thus rendering Monfils highly vulnerable to a danger of violence from Kutska that would otherwise have remained only hypothetical. Under *DeShaney*, therefore, Taylor acquired an affirmative duty to protect Monfils from this danger. His eventual decision to "do nothing" was thus a classic failure to fulfill that obligation, and his conduct was a clear violation of Monfils' substantive due process rights.

When Monfils first called the Green Bay Police Department, insisting on anonymity, it was the Police themselves who, without Monfils' knowledge or consent, made a recording of his call that was the only means through which the latent threat of private violence by Kutska could be transformed into an actual danger of retaliation against Monfils himself. And after Kutska discovered the existence of this recording and approached the Police to get a copy, it was Lt. Michael Mason, with help from Records Office Manager Shay Gierczak, who swallowed Kutska's claim to have been defamed and took

it upon himself to find and copy the recording, to call Kutska to tell him when and how he could pick up the tape, and then to place the tape in the Records Office less than 30 feet from Deputy Chief Taylor's own office.

The evidence also demonstrates that Taylor was aware of these affirmative acts by officers and employees in his own Department, and of their dire import for Monfils' safety. Taylor himself conceded that Monfils told him that he had reported Kutska, insisting on anonymity, and that Kutska was after the recording of the call and would be able to identify Monfils from it. But the evidence also establishes that Taylor knew much more than this about the danger in which the Police had already placed Monfils.

Lt. Mason told Kutska on November 19 that he could pick the tape up the next day, and Monfils learned the next morning that Kutska would be picking up the tape that afternoon. The jury therefore had ample reason to conclude that when Monfils called Taylor that morning, much alarmed, he told Taylor not just that Kutska had requested the tape from the Police but that they were actually going to give it to him later that day. This newly urgent threat and the clarity and vehemence of Monfils' previous descriptions of Kutska to the Police also strongly reinforce the evidence that Monfils did indeed inform both Taylor and Assistant DA Hitt in the clearest possible terms that Kutska was violent and dangerous and that Monfils feared greatly for his safety if Kutska were to get the tape and identify him from it. As the Court of Appeals found, "Taylor knew of the increased danger, for he talked to Monfils about it." (Pet. App. 17.)

Taylor also testified that he had concluded, even before Hitt called him, that the tape must not be released to Kutska. Hitt then reinforced that conclusion, telling Taylor that Monfils sounded scared and *instructing* Taylor – rather than merely "opining," as the Petition would have it (p. 4) – that the tape was exempt from disclosure under Wisconsin law and should not be released to Kutska.

By the time Hitt had issued this instruction, therefore, Taylor knew clearly that subordinate members of his own Department had already acted affirmatively to increase greatly the danger Kutska posed to Monfils. Taylor knew that the Police were soon going to give to a dangerous and violent thief a Police recording that would irretrievably destroy the confidentiality of an anonymous citizen informant, and Taylor knew that this impending disclosure was improper under state law and contrary to the most fundamental obligations of law enforcement agencies to their citizen informants. (Tr. 828).[8] Despite this knowledge, however, Taylor then proceeded to take affirmative actions of his own that did not just heighten Monfils' vulnerability to violent retaliation by Kutska but in fact guaranteed, in and of themselves, that he would be subject to such danger in a manner that he would not have been had Taylor not acted as he did.

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[8] *Dole v. Local 1942, Intern. Broth. of Elec. Workers, AFL-CIO*, 870 F.2d 368, 372 (7th Cir. 1989); *Simmons v. City of Racine, PFC*, 37 F.3d 325, 328, 329 (7th Cir. 1994). *Cf. Maynard v. City of Madison*, 101 Wis.2d 273, 284, 304 N.W.2d 163 (Ct. App. 1981); *State v. Outlaw*, 108 Wis.2d 112, 121, 321 N.W.2d 145, 151 (1982); *State v. Watkins*, 39 Wis.2d 718, 159 N.W.2d 675 (1968); § 905.10, Wis. Stats. (1991-92).

After speaking to Monfils, Assistant DA Hitt had decided to act himself to prevent the tape's release, not just by contacting Taylor but also by calling Specialist John Lampkin, who, Hitt knew, was already familiar with Monfils' plight. After Taylor confirmed to Hitt that Lampkin was responsible for working with the tapes, Hitt offered to follow through by contacting Lampkin himself to order that the tape not be given to Kutska. Had Hitt done so, the evidence leaves no question that the impending release of the tape and the danger it posed to Monfils would have been averted. Hitt would immediately have called Lampkin, and Lampkin himself confirmed that he would then have referred Hitt directly to Records Manager Shay Gierczak or contacted her himself. Had Hitt actually contacted Lampkin, therefore, he or Lampkin would have learned quickly from Gierczak that Kutska's copy of the tape was at that moment waiting on a nearby desk in the Records Office, and its release would then have been stopped cold on the strength of Hitt's authoritative instructions.

As it was, however, Taylor acted to deter Hitt from contacting Lampkin or following through by other means to prevent release of the tape. As the Court of Appeals found, "Taylor said he would take care of it, and he assured Hitt that the tape would not be released" (Pet. App. 5), and the direct result, as Taylor intended, was that Hitt took him at his word and did nothing further. These are *affirmative* acts on Taylor's part. Had he in fact "done nothing" at this juncture, Hitt would have intercepted the tape, and it was only Taylor's active intervention that forestalled that outcome.

The inevitable result of Taylor's conduct, moreover, was to render Monfils substantially more vulnerable to the danger posed by Kutska than he would otherwise have been. Had Taylor not intervened, the only protection that Monfils needed from the Police – that they simply refuse Kutska's request for the tape – would finally have been given, and Monfils would once again have been safe from Kutska. By acting to cut off Hitt's intervention, therefore, Taylor removed the last effective bar to release of the tape and placed Monfils, once again, in extreme danger.

Taylor's actions are thus the very essence of what *DeShaney* meant by danger that the state itself has affirmatively "played [a] part in creating" (189 U.S. at 201), and his conduct in this case was therefore anything but "merely passive," as the Petition would have the Court believe. When Taylor checked his computer, after finishing with Hitt, and then decided to "do nothing" to prevent release of the tape, he had already acted affirmatively to "place [Monfils] in a position of danger [he] would not otherwise have faced" (*Wallace v. Adkins*, 115 F.3d at 429), and Taylor thus had an affirmative duty to "protect him to the extent of ameliorating the incremental risk" (*Archie v. City of Racine*, 847 F.2d at 1223), by taking the few simple steps that would have intercepted the tape before it was released to Kutska that afternoon. Taylor's utter failure to take those steps, therefore, was not the whole of his role in this case, as he now pretends, but only its tragic second act, and Taylor's conduct thus constitutes a clear substantive due process violation within the meaning of *DeShaney*.

None of this was lost on the Court of Appeals, which plainly recognized in its Opinion that Taylor's violation rested both on his assurance to Hitt that he need not act to intercept the tape because Taylor would, and on Taylor's subsequent failure to follow through. The Opinion opens with an accurate exposition of the state-created danger doctrine, including the requirement that the state have acted "affirmatively" to place the plaintiff in new or heightened danger (Pet. App. 7-8), and the Court later reiterates the necessary elements of such a claim: First, "what actions did the [state actors] affirmatively take," and second, "what dangers would [the plaintiff] otherwise have faced." (Pet. App. 10.) After rejecting plaintiff's ratification claim, the Opinion then returns to the issue of whether Taylor's conduct constitutes a substantive due process violation, and the Court leaves no doubt about its ultimate conclusions regarding the actions Taylor took and the degree of danger that Monfils would otherwise have faced:

> Taylor created a danger and, by assuring Hitt (the assistant district attorney) that he would make sure the tape was not released but not following through, he created a danger Monfils would not otherwise have faced.

(Pet. App. 12-13.) And later in the Opinion, the Court turns to the question "whether the evidence was sufficient for the jury to conclude that Taylor placed Monfils in a position of danger greater than he would otherwise have faced." Answering in the affirmative, the Opinion concludes:

> To repeat ourselves, Taylor knew of the increased danger, for he talked to Monfils about

> it. He was told by Hitt that the tape fell within an exception to the Open Records Law and should not be released. He assured Hitt that he would prevent its release, but he nevertheless allowed it to get out, which, in turn allowed Kutska to identify Monfils as the informant. As an experienced police officer, Taylor knew the dangers informants face. Given these facts, it is hard to imagine how the jury could have failed to conclude that Taylor placed Monfils in a position of heightened danger.

(Pet. App. 16-17.)

No court or litigant in the future could read this exposition of the state-created danger issue and come away convinced that the Seventh Circuit had somehow departed from *DeShaney* and, for the first time, found a substantive due process violation solely on the basis of a state actor's "inaction" or his "failure to take more affirmative steps" to protect a citizen from a danger that state actor had played no role in creating. No matter how many times the Opinion recites that Taylor "did nothing" after speaking to Hitt, the Court is clearly not implying that it was this inaction, in itself, that constituted the creation or enhancement of danger by the state that the Opinion explicitly recognizes as a requirement for a substantive due process violation. The Court understood, instead, that Taylor had elected to do nothing more to protect Monfils only after he had first actively cut off Hitt's intervention, and it is the combination of these actions that the Opinion identifies as the true basis of its substantive due process holding.

In a telling acknowledgment of this fact, Taylor's final argument suggests that even though Taylor *did* act

affirmatively by giving an assurance that Monfils would be protected, such conduct would somehow still be insufficient to support a substantive due process violation. (Petition, pp. 13-14.) But none of the cases Taylor cites provides any support for this last-ditch argument. In each of these cases the challenged police conduct – the implicit or explicit assurances of protection in *Losinski* and *Pinder* and the inept medical advice in *Archie* – was given to the victim herself, and the link between that police conduct and the victim's resulting failure to engage in "self help" was either highly uncertain or, as in *Archie* (847 F.2d at 1216, 1218), altogether unproven.

This case is fundamentally different. To be sure, Taylor did make a promise to Monfils himself that the tape would not be released, but it is not this promise or Monfils' own response to it that lie at the heart of Taylor's substantive due process liability. Whatever Taylor may have said to Monfils himself, Taylor also engaged in affirmative conduct toward a third person – Assistant DA Hitt – who fully intended to give Monfils effective and authoritative protection from release of the tape, and there is no question that Taylor's affirmative assurances to Hitt had the purpose and effect of deterring Hitt from acting and thus cut off an official source of certain rescue for Monfils. Taylor's conduct is therefore far more comparable to cases such as *Freeman v. Ferguson*, 911 F.2d at 54, holding that substantive due process liability could exist under *DeShaney* where a police officer affirmatively interferes with official protective services that would otherwise have been provided by the police themselves, or *Ross v. U.S.*, 910 F.2d 1422, 1431 (7th Cir. 1990), finding substantive due process liability where the police actively interfere with effective rescue even from *private* sources.

Moreover, in none of these cases – including *Freeman* and *Ross* – was it the police *themselves* who had created the very conditions from which the victim needed protection in the first place, by revealing the location or identity of the victim, for example, or in some other fashion increasing the victim's vulnerability to private violence. Had such circumstances been present in any of these cases, as they plainly were here, there is no question that the Courts of Appeals – even in the Fourth Circuit – would have found liability against an officer who had acted to deter the police from rescuing a citizen from a known danger that the police themselves had played a central role in creating.

CONCLUSION

Taylor has thus failed to establish any viable ground on which to grant his Petition. No amount of semantics can disguise the fact that Tom Monfils was placed in danger by affirmative state conduct within the meaning of *DeShaney* and the decisions following it, and there is thus no conflict of law that this Court can or should intervene to resolve.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SUSAN MONFILS, As Special Administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS and JOHN-THOMAS MONFILS, By BRUCE R. BACHHUBER, Their Guardian Ad Litem,

Plaintiffs,

v.

CITY OF GREEN BAY, A Municipal Corporation, CITY OF GREEN BAY POLICE DEPARTMENT, CITIES AND VILLAGES MUTUAL INS. CO., a Wisconsin Insurance Corporation, DEPUTY CHIEF JAMES TAYLOR, JOHN LAMPKIN, MICHAEL MASON, KEN LATOUR and DENISE SERVAIS,

Defendants.

Case No. 95-C-1239

(Filed Nov. 24, 1997)

DECISION AND ORDER

The Defendants in the above-captioned case have moved for judgment as a matter of law or, in the alternative, for a new trial. *See* Federal Rules of Civil Procedure 50(b) & 59. The grounds raised by the Defendants are as follows:

> 1. There was no legally sufficient evidentiary basis for the jury to find that the City of Green Bay ratified unconstitutional conduct on

the part of Deputy Chief Taylor and that this was a cause of injury to Thomas Monfils.

2. The Court's instructions on due process and ratification regarding Taylor were erroneous and prejudicial.

3. The court erroneously excluded evidence on Chief Langan's efforts to lobby for changes in the Open Records law, the enactment of § 19.36(8), Wis. Stats., and the change in department policy.

4. There was no legally sufficient evidentiary basis for the jury to find that the City of Green Bay deprived Thomas Monfils of his right to equal protection under the law.

5. The Court's instruction on equal protection was erroneous and prejudicial.

6. The actions of the individual defendants, Denise Servais, Kenneth LaTour, John Lampkin, Michael Mason and James Taylor were discretionary, entitling them to discretionary act immunity, and not "ministerial," as the Court ruled as a matter of law.

7. The Court erred by failing to instruct on the Open Records Law.

8. The murder of Thomas Monfils was a superseding cause of injury to the plaintiffs.

9. The plaintiffs' claims must be dismissed on grounds of public policy.

10. The Court erred by refusing to admit evidence and to submit questions about the causal negligence of other persons and entities on the special verdict form.

Motion for Judgment Under Rule 56(b), or Alternatively, for a New Trial Under Rules 50(b) and 59 at 1-2.

When ruling on a motion for judgment as a matter of law following the return of a jury's verdict, the court cannot reweigh the parties' evidence or pass on the credibility of witnesses or substitute its own judgment of the facts for that of the jury. Instead, it must view the evidence most favorably to the parties against whom the motion is made and give those parties the benefit of all reasonable inferences that may be drawn from the evidence. *See Haley v. Gross*, 86 F.3d 630, 632 (7th Cir. 1996). The Defendants must convince the court that no reasonable jury could have found for the Plaintiffs. *See Maier v. Lucent Technologies, Inc.*, 120 F.3d 730, 738 (7th Cir. 1997).

Under this standard, the court concludes that the Defendants are not entitled to judgment as a matter of law. They have not persuaded the court that the legal issues they raise (which were already addressed on the record at trial) should be reconsidered and the factual evidence was more than sufficient to support the verdict.

A new trial may be granted if the verdict is against the weight of the evidence, the damages are excessive, or if the trial was not fair. A motion for a new trial can also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions. *See Eastern Natural Gas Corporation v. Aluminum Company of America*, 126 F.3d 996 (7th Cir. 1997); *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996).

In this case the court does not believe that a new trial is warranted to prevent injustice. The verdict is not against the clear weight of the evidence. To the contrary,

the evidence supporting the Plaintiff's theory of liability was overwhelming. Moreover, the court considered all the legal grounds raised by the Defendants during trial and is not left with a definite or firm conviction that a mistake has been made.

For these reasons, the court ORDERS that the Defendants' "Motions for Judgment Under rule 50(b), or Alternative, for a New Trial Under Rules 50(b) and 59" (filed July 10, 1997) ARE DENIED.

IT IS FURTHER ORDERED that the Clerk of Court shall enter an order denying post verdict relief as a separate document. *See* Federal Rule of Civil Procedure 58.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 24th day of November, 1997.

/s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN District of WISCONSIN

AMENDED
JUDGMENT IN
A CIVIL CASE

SUSAN MONFILS, As Special Administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS and JOHN-THOMAS MONFILS, By BRUCE R. BACHHUBER, Their Guardian Ad Litem,

v.

CASE NUMBER:
95-C-1239
(Filed Nov. 24, 1997)

CITY OF GREEN BAY, A Municipal Corporation, CITY OF GREEN BAY POLICE DEPARTMENT, CITIES AND VILLAGES MUTUAL INS. CO., a Wisconsin Insurance Corporation, DEPUTY CHIEF JAMES TAYLOR, JOHN LAMPKIN, MICHAEL MASON, KEN LATOUR and DENISE SERVAIS,

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' "Motions for Judgment Under Rule 50(b), or alternative,

for a New Trial Under Rules 50(b) and 59" (filed July 10, 1997) ARE DENIED.

Dated: November 24, 1997

/s/ SOFRON B. NEDILSKY, Clerk

/s/ D. McLeod
(By) Deputy Clerk

Supreme Court, U.S.
FILED
JUL 13 1999
CLERK

No. 98-1744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES TAYLOR,

Petitioner,

v.

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

Respondents charged only petitioner, Deputy Chief Taylor, with violating Thomas Monfils' constitutional right to due process under the state-created danger theory indicated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Respondents did not charge any other individual officer of the Green Bay Police Department with violating Monfils' due process right. Consequently, Taylor's conduct alone is determinative of whether there was a due process violation.

1. Respondents' reliance on the conduct of the entire Police Department to establish a due process violation by petitioner under the state-created danger theory is inappropriate.

Respondents claim that "Taylor and other police personnel subordinate to him" created the tape and then proceeded to produce it for Keith Kutska. (Brief in Opposition, p. 15). This claim is erroneous. It is undisputed that Taylor did not create the tape and he did not release it to Kutska.

Respondents then claim that it was the "police themselves" who made the tape and, thus, that it was the "police themselves" who created the very conditions from which Monfils needed protection in the first place; further, that it was "Lt. Michael Mason, with help from Records Office Manager Shay Gierczak, who swallowed Kutska's claim to have been defamed" and released the tape. (*Id.*, pp. 15, 23)

These claims are irrelevant. Taylor did nothing to facilitate the release of the tape. He did not direct Lieutenant Mason or anyone else to release the tape. He did not know the tape was about to be released. He did not know that Lieutenant Mason had "taken it upon himself to find a copy of the recording," and he did not know that Lieutenant Mason had placed the tape in the Records Office "less than 30 feet" from his own office. (*Id.*, p. 16) Respondents cannot use the state-created danger theory to establish a due process violation by Taylor by making him the scapegoat for the alleged faulty conduct of other personnel in the Police Department.

2. Petitioner's inaction towards respondents' decedent is not a basis for the imposition of liability under the state-created danger theory.

Proper focusing on Taylor's conduct rather than on the conduct of the entire Green Bay Police Department makes it abundantly clear that Taylor committed no affirmative acts which created or increased a danger to Monfils.

Taylor had one brief anonymous phone conversation with Monfils during which he told Monfils he would check on the tape and put a note in Monfils' police report that the tape should not be released. Shortly afterwards, Taylor received a call from Assistant District Attorney Hitt, who said he had gotten a similar anonymous call, that the caller sounded scared, and that in his (Hitt's opinion) the tape should not be released. Hitt offered to call Lieutenant Lampkin to make sure the tape was not released, but Taylor said he would take care of it and put

a note with the police report. Taylor then checked the computer, found no report of Monfils' call, concluded there was nothing he could do, and did nothing further.

Neither Taylor's knowledge of the danger to Monfils nor his promise to do something to prevent release of the tape gives rise to an affirmative duty to protect Monfils. *DeShaney*, 489 U.S. at 200. Taylor's conduct was not affirmative misconduct for the purpose of respondents' § 1983 claim; rather, it constituted a failure to act. As was true in *DeShaney,* Taylor did not "create" the danger to Monfils; he simply failed to provide adequate protection from it. As in *DeShaney*, the most that can be said of Taylor is that he "stood by and did nothing when suspicious circumstances dictated a more active role for [him]." 489 U.S. at 203. This case is purely an omission or "failure to act" case which, under *DeShaney*, is nonactionable under § 1983.

Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990), and *Ross v. United States,* 910 F.2d 1422 (7th Cir. 1990), which respondents find "more comparable" to the instant case than any other, actually support this conclusion. In *Freeman*, the court considered an allegation that a woman and her daughter were killed by the woman's estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was a "close bosom buddy" of the police chief, from threatening and intimidating her. The Eighth Circuit concluded that *DeShaney* would not bar a § 1983 action based on the allegation that the police chief had affirmatively interfered with the conduct of other officers:

> [Such an allegation] presents a claim that the violence the decedents were subjected to was not solely the result of private action, but that it was also the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community—with such interference increasing the vulnerability of [the victim] to the actions of [the private individual] and possibly ratifying or condoning such violent actions on his part. . . . Without such affirmative actions on the part of the chief of police, the danger faced by the [victim] would have arguably been less." (911 F.2d at 54-55)

In *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), a friend summoned help for a 12-year-old boy who fell into a lake. Within 10 minutes two lifeguards, two fire fighters, one police officer and two scuba-diving civilians responded. However, before they could attempt a rescue, a county deputy sheriff on lake patrol arrived in a marine patrol boat and insisted on enforcing a county policy that only the city's fire department divers could perform rescues. The deputy ordered all rescue attempts to stop. When the civilian scuba divers offered to attempt a rescue at their own risk, the deputy threatened to arrest them and even positioned his boat so as to prevent their dive. Twenty minutes later, the officially authorized divers pulled the boy from the water, and he later died. The court found that the complaint stated a claim against both the county and the individual deputy.

The lesson of *Freeman* and *Ross* is that an officer cannot "arbitrarily assert [his] power so as to cut short a person's life." 910 F.2d at 1433. There is no evidence here

that Taylor used his power "so as to cut short [Monfils'] life." There is no evidence that Taylor knew Lieutenant Mason was ready to release the tape to Kutska and allowed that to happen. There is also no evidence that Taylor used his official power to do anything to prevent Hitt from pursuing the matter or from directly contacting Lieutenant Lampkin. The only things respondents can point to in support of their assertion that Taylor acted affirmatively to deter Hitt from preventing the release of the tape are Taylor's statement to Hitt that he would "take care of" the situation and respondents' conclusion that, absent Taylor's assurance, Hitt would have called Lampkin directly.

It was not Taylor, however, that prevented Hitt from calling Lampkin. Hitt himself chose not to call Lampkin. Taylor did not, verbally or physically, restrain Hitt from calling Lampkin. Hitt simply assumed that after speaking with Taylor, he did not need to. Likewise, nothing prevented Hitt from calling Taylor to see if Taylor had taken care of the matter. For Taylor to be liable under § 1983, he must have done something more than say "I'll take care of it."

Affirmative action, not inaction, is the predicate for liability under § 1983. Under *DeShaney*, Taylor's inaction is insufficient to establish a constitutional due process violation. The opinion of the Court of Appeals below represents an unprecedented expansion of the "state-created danger" theory in holding that Taylor is liable for his "inaction" in not taking affirmative steps to prevent the release of the tape. This holding directly contradicts this Court's caution against expanding the concept of

substantive due process (*Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and simply invites unnecessary litigation over whether omissions by public officials establish a substantive due process violation.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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